

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO. 2405 OF 2002

IN

SUIT NO. 4847 OF 1995

Feroze Homi Duggan .. Plaintiff

versus

Benzer Interiors Pvt.Ltd. & ors. .. Defendants

...

Mr.H.J. Thakker i/b Solomon & Co. for the plaintiff.

Mr.Sanjay Jain with Deepa Mani i/b S.K. Srivastava
for the defendant nos.1 and 10.

CORAM : D.G. KARNIK, J.

DATED : 4th March 2005.

ORAL JUDGEMENT:-

1. Heard the learned counsel for the plaintiff
and defendant nos.1 and 10. None present for the
defendant nos.2 to 9.

2. This motion is taken out by the plaintiff with a prayer that the defence of the defendant nos.1 to 5 and 10 to the suit be struck off on the ground that they have committed persistent breaches of the orders of this Court mentioned in prayer clause (a) of the motion and in particular the order of the Division Bench of this Court dated 2nd April 1997 passed in appeal lodging no.270 of 1997 and of the undertaking given by the defendant no.10 in the capacity as a Director of the defendant no.1, a copy of which is annexed at Exhibit-G to the affidavit in support of the motion. In addition, an order is also sought for detention of the defendant nos.1 and 10 in civil prison for wilfully disobeying the aforesaid orders and committing a breach of the undertaking mentioned above. The defendant nos.1 and 10 oppose the motion.

3. Since breach of the order dated 2nd April 1997 is alleged it would be useful to quote below the order which reads thus:

1. Heard the learned Counsel for the parties. At their request the matter is taken up for final hearing

2. It is agreed by the Appellant as under:-

i) That the Appellant would pay royalty at the rate of Rs.3.00 lakhs to the Court Receiver for the use and occupation of the suit premises. That the royalty of Rs.3.00 lakhs will be paid regularly every month on or before 10th of each month.

ii) That the Appellant would execute agency agreement with the Receiver within a period of 15 days from today.

iii) The Appellants would file an undertaking before this Court to the effect that the remaining royalty amount of Rs.58.00 lakhs for the period upto 31st March, 1997 would be paid on or before 20th May, 1997.

However, it is clarified that this payment or royalty to the Receiver would be without prejudice to the rights and contentions of the Appellant that the Appellant is tenant of the disputed premises.

iv) That the Appellant would pay the Municipal taxes and other outgoings in respect of the disputed premises on the due dates.

v) That the payment of future Municipal Taxes and other outgoings would be made through the Court Receiver.

vi) That the Director of the Appellant Company would file necessary undertaking before this Court on or before 5th April 1997.

vii) If there is any default in payment of the royalty amount for a period of two months then it would be open to the Receiver to take possession of the property in question.

3. Affidavit filed by the Authorised Signatory of the Appellant is kept on record. It is agreed that this Affidavit be treated as an undertaking.

4. Order in terms of the aforesaid statements. The Appeal is partly allowed to the aforesaid extent. The Notice of Motion taken out before the learned Single Judge would not survive and accordingly it stands disposed of. (Underlining supplied)

In pursuance of this order the defendant no.10, in the capacity as a Director of defendant no.1, filed an undertaking in the Court which reads thus:

I, Mrs. Sandhya P. Vakil, the Director of M/s.Benzer Interiors Private Limited, Appellant abovenamed state on solemn affirmation as under:-

1. I hereby annex the uncertified copy of Order dated 2.4.1997 passed by Hon'ble Appellate Bench presided by Hon'ble Chief Justice His Lordship Justice Shri M.B.Shah and His Lordship Justice Shri Rebello and it is marked as "Exhibit-A".

2. Pursuant to the said order dated 2.4.1997, on behalf of the Appellant Company, I hereby give Undertaking as follows:-

a) Appellant shall pay the sum of Rs.58 lakhs on or before 20th May, 1997 to the Court Receiver High Court, Bombay.

b) Appellant would pay Rs.3,00,000/- per month to the Court Receiver High Court Bombay, for use and occupation of suit premises on or before 10th day of

each month regularly.

c) Appellant would pay Municipal taxes and other outgoings in respect of the disputed premises through Court Receiver High Court, Bombay.

3. This Undertaking is given without prejudice to the rights and contentions of the Appellant that the Appellant is tenant of disputed premises.

Solemnly affirmed at Bombay)
this day of April, 1997)

For Benser Interiors Pvt.Ltd.

Sd/-
Mrs.Sandhya P. Vakil
Director

4. By the order dated 2nd April 1997, which was passed by consent of the parties, the defendant no.1 was required to deposit with the receiver the sum of Rs.58,00,000/- on or before 20th May 1997 and further to deposit Rs.3,00,000/- p.m. on or before 10th day of each month and also to pay municipal taxes and other outgoings. The defendant no.1 did not pay the sum of Rs.58,00,000/- on or before 20th May 1997 nor did it pay Rs.3,00,000/- per month as ordered by the Court and undertaken by it in the undertaking.

5. Learned counsel for the defendant no.1 and 10 admits that the defendant no.1 committed a breach of the order of Division Bench dated 2nd April 1997 as also the undertaking mentioned above by not depositing Rs.58,00,000/- within the time specified and also by not depositing the monthly instalments of royalty.

6. Learned counsel for the defendant however submits that mere breach of an order of the Court or breach of an undertaking to the Court would not by itself be a ground for striking out of the defence under Order 39 Rule 11 of the Code of Civil Procedure. He submits that provisions of Order 39 Rule 11 are directory and not mandatory and relies upon the decision of a Division Bench of this Court rendered in Ramavatar Surajmal Modi Versus Mulchand Surajmal Modi, reported in 2004 (2) Mah. L.J. 1. Therein, this Court has held that the provisions of Order 39 Rule 11 (Maharashtra Amendment) are directory and not mandatory. This Court has further held that since the provisions are directory, it would not be obligatory for the Court to strike out the defence in each and every case where there has been a breach of an order of the Court or breach of

an undertaking given to the Court by the defendant. The Division Bench has enumerated the factors which need to be looked at by the Court while considering whether the defence of the defendant be struck off when the defendant is proved to have committed a breach of an order of the Court and/or an undertaking given to the Court. A reference may also be made to the decision of the Supreme court reported in M/s.Babbar Sewing Machine Co. Vs. Trilok Nath Mahajan AIR 1978 S.C. 1436, wherein the Supreme Court has considered Order 11 Rule 21 of the Code of Civil Procedure which also permits the Court to dismiss a suit or strike out the defence for non compliance of the order for discovery. Therein, the Supreme Court held that an order for striking out of the defence Under Order 11 Rule 21 should not be made unless there has been an obstinate or wilful attempt to disregard the order of the Court. In my view, even where the breach of an order of the Court or breach of an undertaking is proved to have been committed by the defendant, the Court may strike out the defence of the defendant only if it is satisfied that the conduct of the defendant is obstinate and contumacious or amounts to wilful attempt to disregard the order of the Court.

7. Learned counsel for the plaintiff submits that the conduct of the defendant in the present case is not only contumacious but has even been obnoxious. He refers to and relies upon the observations made by the Division Bench of this Court in its order dated 29th October 2001 in Notice of Motion no.2239 of 2000 in Appeal no. 324 of 1997 arising out of this very suit. Therein, this Court observed:-

"At the outset we may observe that the respondent no.8 - one of the directors of the appellants who had filed undertaking before this Court in the month of April 1997 sought to interfere with the administration of justice by contacting one of us (Nishita Mhatre, J) which was indeed very disturbing and amounted to contempt of the Court. We initially thought of initiating action of contempt against respondent no.8 for having attempted to pollute the stream of justice but then on second thought persuaded ourselves that our expression of displeasure and out stern warning must have necessary effect on respondent no.8 and she would not make any such attempt in future. (The appellant no.1 and respondent no.8 therein are respectively defendant nos.1 and 10 in this suit)
(underlining supplied)

The Division Bench also noted the other conduct of the defendant no.10 herein, in the proceedings and observed in paragraph no.4 of this order

"A litigant cannot be permitted to play the game of hide and seek with the Court. If the argument of the learned senior counsel on behalf of appellants is accepted it would amount to giving premium to a litigant who was not honest with the Court in disclosing material facts in the affidavits and when it suited such litigant to permit him to somersault."
(underlining supplied)

8. The learned counsel for the defendants while admitting the past obnoxious conduct of the defendants 1 and 10 submits that there are mitigating circumstances. According to him, the defendant no.1 having voluntarily handed over possession of the suit premises to the receiver on 24th October 2001 should not be visited with further penalty of striking of the defence. I am afraid the possession was not handed over to the receiver voluntarily. Several attempts were made by the defendant no.1 to hold on to the possession without payment of the royalty. Records of the Proceeding are full of the Notices of Motions and appeals, which show the attempts were made by the defendant nos.1 and 10 at every stage to retain the possession of the suit premises without payment of

the royalty and the charges which they themselves had agreed to pay before the Division Bench on 2nd April 1997 and they had given a written undertaking to the Court to that effect. They wilfully committed default in payment from 1997 till October 2001 and only when it became impossible for them to further continue the possession and the receiver was about to take possession by use of force that they surrendered the possession. The defendant nos.1 and 10 have committed wilful breach of the order of the Division Bench and the undertaking given by them. The conduct of the defendant nos.1 and 10 has been reprehensible as noted by the Division Bench in its order dated 29th April 2001. Even otherwise, the defendant nos.1 and 10 have wilfully committed a breach of the order of this Court and undertaking given to this Court without any justifiable reason. In the circumstances, I am inclined to strike off their defence.

9. As regards prayer for detaining the defendant no.10 in civil prison, I am of the view that ends of justice would be served by only striking out of the defence. The defendant no.10 should not be imposed with a further penalty of

detention in the civil prison. As laid down by the Supreme Court in the case of Suresh Chandra Poddar Vs. Dhani Ram, reported in AIR 2002 S.C. 439, the contempt jurisdiction is to be used sparingly. The object of the contempt jurisdiction is to maintain the majesty of the Courts and not necessarily to punish every breach of the order of the Court or every breach of an undertaking given to the Court. No doubt, the conduct of the defendant nos.1 and 10 is contumacious. However, in my view, striking out of the defence is a sufficient penalty to the defendants for breach of the order of the Court and the breach of the undertaking and it is not necessary to exercise the penal jurisdiction to order detention of defendant no.10 in civil prison.

11. For these reasons, motion is partly allowed and the defendant of the defendant nos.1 to 5 and defendant no.10 is struck off. Let the suit be listed for ex-parte hearing before the appropriate Bench.

12. The plaintiff is granted liberty to take out separate proceedings in respect of the reliefs mentioned in prayer clause (d).

13. At the request of the learned counsel for the defendant nos.1 and 10, operation of this order is stayed for a period of three weeks.

D.G. KARNIK, J